

CHAPTER 22

LEGAL ISSUES

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POWER OF ATTORNEY

Definition

A power of attorney (POA) is a document by which one person authorizes another to take actions on his/her behalf. The person signing the POA (generally referred to as the Principal or the Grantor) states, in effect, that s/he is not or cannot be present to perform a certain action or sign a certain document, and that s/he is authorizing another person (generally referred to as the Attorney in Fact or Agent) to take that action or sign that document. A POA assures the person or institution that needs the signature that the Principal will honor the signature of his/her Attorney in Fact (Agent) and be legally bound by it, just as if the Principal had been there and signed it. Do not confuse the term "Attorney in Fact" with Attorney at Law; your POA agent does not have to be a lawyer.

Frequently the Principal designates his or her spouse as the Agent; often each spouse gives a POA to the other. But the Agent need not be a spouse. You might choose to give a POA to a friend, lawyer, broker, banker, or accountant, who would be more readily available and perhaps more experienced in a particular business matter, or to a parent or an adult child.

If you are signing another person's name, using authority that you hold under a POA, you should sign as follows:

"John Smith, by Mary Smith as attorney in fact."

Types of Power of Attorney

There are 2 types of powers of attorney:

1. A **general power of attorney** says that the Agent can do anything and everything on behalf of the person who signed it (the Principal).

2. A **special power of attorney** (sometimes called a **limited power of attorney**) sets limits on what the Agent or Attorney in Fact may do, or specifies the particular action that is to be taken on behalf of the Principal. For example, the Principal might authorize the Agent to sell a car.

Another example might be when the Foreign Service couple travels separately. If one spouse is traveling separately from the other and is bringing along a minor child, there are many countries where the authorities can stop the child from traveling without the written consent of the other spouse. The solution is to have an authorizing statement prepared by the second spouse, sealed at the country's foreign ministry, and given to the traveling spouse. Moreover, if a child is away from post for a significant period of time, e.g., at boarding school, and the parents are killed or injured to the point of no longer being able to make competent decisions, someone needs to have a special power of attorney to access funds for the minor's maintenance.

Either a general POA or a special POA can be limited in other ways than defining the activities to which it applies. For example, it might be valid only until a certain date, valid only during assignment to a particular country, or valid only in the event of hostage-taking, evacuation, or physical disability. The most common and familiar use of POAs (usually a special POA) at overseas posts is for cashing checks.

Although it is obviously impossible to prepare for every conceivable emergency or contingency, families should reflect on the following checklist of situations and consider what would happen if the employee and/or spouse were unavailable:

- Withdrawing funds from both checking and savings accounts. Check with financial institutions: they generally have their own in-house POAs;
- Obtaining or extending loans (including educational loans) from banks or credit unions, opening charge accounts or lines of credit;
- Renting, buying, or leasing real estate;
- Invoking the diplomatic clause to reoccupy own home;
- Borrowing to buy a house;
- Buying, selling, or registering a car;
- Borrowing for consumer items (clothing, furniture, appliances);
- Selling or buying stocks, bonds, mutual funds, certificates of deposit (CDs); reinvesting when bonds, money markets, or CDs mature;
- Signing for minor children (hospitals, schools, legal matters);
- Managing the affairs of elderly parents;
- Borrowing on life insurance;

- Filing federal, state, and local tax returns.

Advantages and Disadvantages

The advantages of having a POA are obvious: a trusted Agent or Attorney in Fact can take care of your affairs, even if you are unavailable to make the decisions or sign the documents.

Every family should, however, consider the disadvantages as well. The agent whom you trust today may not seem so trustworthy tomorrow; the only certain way to cancel or revoke a POA, unless it has an expiration date, is to tear it up. Also, although you may want and trust someone else to handle certain affairs, there may be some matters (such as a sizable trust fund) that you do not want handled for you, even in an emergency. Consider such factors before giving anyone a general POA.

Another difficulty with POAs is that other persons or institutions are not obligated to accept them. Banks and investment firms may prefer the use of their own in-house forms with a signature by the Principal and the Agent. To cope with some of these situations, joint accounts or joint ownership of investments may serve better than a POA, if the intention is to permit either spouse to have ready access to the funds (even if the account is small). This is something you should check with your bank, broker, or investment firm. Different laws apply in different states. You would want to ask whether there are any special tax implications of joint versus separate accounts, and whether accounts are frozen—even if they are “joint accounts with right of survivorship”—if one spouse dies, or if there is a lawsuit against one owner.

The ideal is for families to plan ahead, to consider the situations that may occur, and to consult attorneys, realtors, banks, or other institutions on the acceptability of POAs for the uses they may anticipate or obtain advice on better alternative contingency plans.

RESIDENCE AND DOMICILE

Where is "home?" Foreign Service families, more than most, have difficulty answering that question. Answering the question, “Where is your residence?” may be even more troublesome. It depends how you use the term "residence," who is asking the question, and the reason for the question.

Foreign Service personnel forms use differing contexts about place of appointment, home leave address, and separation address. These may or may not all be the same, and they may or may not be the same as your domicile or legal residence. Defining these terms is difficult, and we are cautious in our attempt to do so. When legal issues are at stake—such as wills, inheritance, and taxes—it is recommended that you consult a competent lawyer to get a clear answer.

Definitions

Residence is a term with no precise definition. In general terms, your residence is where you are living at the moment or where you have a place of abode, even if it is temporary. To cite one example, the State of Maryland says that you are a resident of Maryland in any particular year—for purposes of determining whether you have to pay resident income taxes—if you have a place of abode within the state for more than six months of that year, even though you may have a domicile in some other state.

Thus you may have more than one residence. You may be residing overseas but still be a resident of Maryland under the definition just given. But, regardless of how many residences you may have under the law, it is generally considered possible to have only one domicile.

While states have different rules on how long it takes to be considered a resident or have a domicile, the same state may have different lengths of time, depending on the reason the question has arisen. These might be, for example, driver's licenses: 30 days; state university: one year; divorce: six months.

Domicile is a legal term. (Sometimes the term "legal residence" is used to mean the same thing, but to avoid confusions we will use only "domicile.") Under English Common Law you acquire at birth the domicile of your parents (which may or may not be where you are born), and your domicile is the same as that of your parents as long as you are a minor. Thereafter, you may acquire a new domicile of your own. The general rule is that to do so you must go to the new location, establish actual residence there, and concurrently have the intention of remaining there indefinitely or of returning there after any temporary absences.

Moreover, because everyone must have a domicile, you do not lose the one that you were born with or acquired later unless you acquire a new one. It is usually not enough just to say that you are giving up your domicile in a particular state. You must show that you have given it up by moving to another state and simultaneously showing that you intend to make that state your permanent home. Your intention is thus an important element—but not the only element—of determining your domicile.

One important exception to the rules above is that intention historically has not been an important element in determining a married woman's domicile. Under Common Law when a woman married she automatically lost her old domicile and acquired the domicile of her husband. In many states, either spouse can choose to assume the other's domicile, or each can retain the prior domicile.

The Importance of Domicile

In several situations, determining domicile is crucial. The following discussion of some of the more common ones is not intended as a substitute for legal advice.

State income tax. If you are domiciled in a state that has an income tax, that state has a claim on you for taxes even when you are absent from the state. If you also owe income tax to another state because of temporary residence there (place of abode), reciprocal agreements often determine which state gets your tax money, or what proportion of it. (Note, however, that a state may relinquish its right to collect state income tax from one of its residents.)

Foreign Service families who are assigned to Washington for the first time need to think about state and local income taxes from the beginning. If you decide to make a permanent move—give up your previous domicile and make Maryland, Virginia, or the District of Columbia your permanent home—you can expect to pay income tax in your new jurisdiction from the time you move there (and also later when you go overseas). If, however, you wish to keep your domicile in your home state while temporarily residing in the Washington area in connection with a Washington assignment, your income tax liability will depend on how long you have a place of abode there in any particular year—and how successful you are in proving, if challenged, that you do not intend to make Washington your permanent home. One suggestion is to write to the tax authorities at the end of the Washington assignment, stating that you are no longer a resident. If a state bills you for back taxes incurred during a period you lived overseas, it is usually necessary to prove that you never intended to establish a domicile in the state that is billing you. The factors that states consider in determining your intent are discussed below under “How Is Domicile Proved?”

Education of Children. Tuition charges at state universities are normally significantly lower for residents than for nonresidents; residents may also receive preferential admission. What most universities are talking about when they use those terms is really “domicile,” and a Foreign Service child who has been moving about the world with his or her parents is sometimes able to establish eligibility for resident fees if the parents can satisfy the university that they have retained their domicile in that state. If a child is interested in a Maryland or Virginia state university, it may be worthwhile to establish a domicile there, offsetting the possible disadvantages that come from incurring income tax liability in that state. Contact state educational institutions and ask how they determine resident status.

Attending School Outside Your Domicile. Each jurisdiction in the Washington area has regulations about children living in one jurisdiction and attending school in another. Foreign Service students temporarily living with friends or relatives while the parents are stationed overseas must pay out-of-county tuition in most districts. In Northern Virginia, children who do not reside in the county must pay tuition even if they are waiting to move into their permanent home in the county. Parents should consider choosing their temporary housing arrangements in the same school district where they plan to settle permanently. Maryland counties handle each situation on a case-by-case basis and will often permit a child to attend classes if the parents can prove they are about to move permanently into the county. For information, contact the Office of Community Relations or Information of the appropriate school district. Useful websites for Northern Virginia include: <http://www.fcps.k12.va.us> for Fairfax County, <http://www.arlington.k12.va.us>

for Arlington County, <http://www.acps.k12.va.us> for the City of Alexandria, <http://www.fccps.k12.va.us> for the City of Falls Church, and <http://www.mcps.k12.va.us> for Middlesex County; for a general guide to the Maryland Public School System, go to <http://www.pwl.com/maryland/pblesch.html>.

In the District of Columbia, parents who wish their children to attend a District school located outside their neighborhood must apply each year between February and April. Students are accepted on a space-available, first-come, and first-served basis. Several thousand transfer requests are processed by the D.C. school system each year, with justifications ranging from economic hardship or inconvenience to a desire for a child to take a particular class or program, or to be in a school with high test scores. For more information, go to: <http://www.k12.dc.us>.

Voting. In a normal situation, a person votes in the state in which s/he is domiciled. Remember that where you vote is one of several factors that state authorities consider in determining your domicile for other purposes. Absentee voting guidelines are available at the Overseas Briefing Center or the consular section at your overseas post.

Deaths and Estates. When you die, taxes on your estate might be levied by the state where you were domiciled or by the state where your real property is located. If your estate is large enough, your heirs may find that two or more states claim the right to tax the estate if a question exists as to which was your domicile. Domicile also may have a bearing on who inherits your property.

If you die without a will, the laws of the state where you are domiciled generally determine dispersal of your property. But if you own a house or other real estate in some other state and that state has different inheritance laws, an expensive conflict is likely, particularly if there is a question as to your domicile.

If you die with a will, the will is probated in a court in the state where you are domiciled. Because formalities for making a valid will are different in different states, it is wise to consult a lawyer about your will. Discuss with your lawyer the question of domicile, including where you would expect the will to be probated. This may be particularly important if you have property in more than one state.

Divorce. In order to file for divorce, your physical presence in the state where you file the petition is required. Usually, you must have been a resident of that state for a certain length of time. However, your spouse does not need to be a resident of that state or to be domiciled there.

How Is Domicile Proved?

An important element in establishing domicile is your intention. How do you prove that intention? Following are types of questions often asked—sometimes in the form of a Questionnaire of Domicile—when a state tax authority, state university, or court has to decide where you are domiciled:

- What do you consider your permanent home? How long have you lived there?

- Where do you actually reside? How long have you lived there?
- Do you own or rent your residence there?
- Do you pay income tax there?
- What other ties do you have to that state? (Examples: family or organizations)
- Do you own retirement property? Where?
- Where do you have investments?
- Where do you vote? How long have you voted there?
- Are you a member of a church, synagogue, or mosque? Where?
- To what professional and civic organizations do you belong?
- What is the location of your bank accounts (checking and savings)? Where are your safe deposit boxes located?
- In what jurisdiction have you obtained licenses (driver's, marriage, professional)?
- What is your home leave address?

How much weight is given to the answers to questions such as these often depends on why the question is being asked. A state may rule on the basis of rather limited evidence that you are domiciled there and therefore required to pay income tax even while you are away. The same state may require much more evidence, or weigh it differently, if you are trying to prove that you are domiciled there and therefore your child is entitled to resident status at the state university.

In sum, no easy answers exist. The closest thing to a rule of thumb would be this: if you do not intend to give up your old domicile when you move, keep as many ties there as you can, and build a record that shows your intention as you go along. To apply this rule to the state income tax, it might be worthwhile to inform tax authorities in your state of temporary residence, in writing, when you file your first tax return that you are doing so only on the basis of physical presence in the state and not because you intend to make it your permanent home. When you leave to go overseas, another letter explaining your status could also help establish your intent.

To avoid problems it is wise to consult a lawyer familiar with the tax situation in your state of temporary residence and/or your domicile.

WILLS AND ESTATE PLANNING

A will is a legal document by which a person makes a disposition of his or her property to take effect at death. Besides designating the persons to whom property is to be distributed, a will also states who should be responsible for seeing that the distribution is properly carried out (the executor), and may also name a person to act as guardian for minor children. A will may also establish who is to get custody of the children upon the parents' deaths, especially if a child is away from home for a significant length of time, e.g., at boarding school.

There are formal requirements for making a will that vary from state to state. These requirements affect how the will is signed, the number of witnesses, and other similar

matters. It is important to have professional assistance or advice in the preparation of a will; unless the formalities are observed, the will may not be valid.

When a person dies without a will (intestate), property is distributed according to a plan set out in the laws of the state in which the person was domiciled at time of death. For instance, if you are married and have children and die intestate while domiciled in the District of Columbia, one-third of your estate will go to your surviving spouse and the remainder will be divided equally among your children. In both cases, the children's share will be the same whether they are minors living at home or adults who have long since left home. If the children are minors, the guardian will have to file annual reports in court accounting for management or disposition of the property that the child has inherited.

State law rarely provides the kind of estate plan that parents would choose. Therefore, it is particularly important for parents of young children to have current valid wills. Wills should be reviewed whenever there is a major change in one's personal situation, such as the birth of a child, the death of a beneficiary, any major change in financial status, or any change in marital status.

Tips on Wills for Foreign Service Families

- A will can be a complex or simple document. Generally, a simple will, revised when circumstances change, is better than a will that attempts to take account of every turn of events far into the future.
- A sensible plan for storing the original will is to leave it for safekeeping with the lawyer who drew it up. Copies may be kept in your personal safe deposit box and with important papers that you take when you travel. The people concerned with settling your estate need to know where the original will is stored. You may wish to send them a copy of the will, information about where the original is stored, and instructions on your wishes should an emergency occur while you are overseas. (A letter of last instruction can be used to explain such matters as location of vital papers, current business affairs, and funeral arrangements desired. It may also be used to dispose of small items of sentimental value or to explain any special provisions of the will such as disinheritance, but it should be reviewed by the lawyer to ensure that it does not conflict with the will.)
- You do not need to have a will in each jurisdiction where you own property. Your will can be probated in the state where you have your principal residence or domicile. Once authenticated in the state where it is probated, this will can be used as authority in other states where property is owned.
- If you own property in more than one state, or if your state of residence is not certain or is likely to change, your will should take account of this. In such a case, the powers of the executor and of any trustee appointed in the will should be spelled out carefully, since the presumptions about such powers may vary in important ways from state to state.
- Destroy the originals of outdated wills as soon as the new will is signed.

ESTATES AND FINANCIAL PLANNING

Many people find that in addition to a will it is helpful to have an estate plan. Although the will is an integral part of such a plan, the estate plan itself includes much more.

Your estate is the sum total of your assets and liabilities at any particular moment. Therefore, the first step in preparing an estate plan is to prepare an inventory:

Liquid Assets:

- a) Yearly salary and other income
- b) Pension and retirement rights
- c) Social Security benefits
- d) Veteran's benefits
- e) Bank and credit union accounts
- f) Stocks, bonds, and other securities
- g) Life insurance cash values

Fixed Assets:

- a) Real estate
- b) Household furnishings
- c) Personal property

Liabilities:

- a) Taxes: federal and state income taxes, property taxes, and others. In case of death, estate and inheritance taxes, plus all of the above if unpaid
- b) Long-term debts (mortgages, etc.)
- c) Short-term debts (charge accounts, car payments)
- d) Household expenses (utilities, repairs and maintenance, food)
- e) Educational expenses (for self and children)
- f) Insurance payments (life, medical, liability, accident, travel, property, personal, and household)
- g) Contributions to retirement (pension, Social Security, and IRAs), savings, and other investment plans
- h) Other contributions and gifts
- i) Vacations and entertainment
- j) Children, aged parents, and relatives
- k) Pets

The next step is to set short-term and long-term financial goals, taking into account such major items as college costs for children and a comfortable income level after retirement.

Then you need to determine whether, in light of your current financial situation, these goals are realistic and attainable. Develop a plan, perhaps with one or two alternatives, to achieve these goals or to approach them as closely as possible. A family dependent upon two wage earners needs to assess insurance coverage to be sure that the goals will be met even if there are drastic changes in income as the result of death or disability. In an estate where the surplus exceeds the anticipated lifetime needs of the owner, the plan can provide for orderly disposition of the excess in order to minimize the effect of estate and gift tax laws.

An estate plan can be as elaborate or as simple as you wish. Computer-generated plans are often available from financial planners and advisers. Such plans can take into account a multitude of variables, from projected Social Security and pension benefits to projected increases in the costs of college education. Such plans, which attempt to predict the future, are fallible; but properly used, they can help the estate owner to get a better idea of whether financial goals are realistic and attainable and provide guidelines for achieving them.

RESOURCES

American Bar Association Service Center

541 N. Fairbanks Ct.

Chicago, IL 60611

312-988-5522

<http://www.abanet.org/legalservices/lris/directory.html>

State-by-state lawyer referral and information service

<http://www.abanet.org/pubresource>

Links to referrals, information on legal assistance, legal insurance, publications and other information

Martindale-Hubbell Law Directory. A list of lawyers by city, state, and specialization.

Available in embassy and public libraries. Online at <http://www.martindale.com> or

<http://www.lawyers.com>.

Voting Assistance Guide. Published by the Department of Defense every two years; available at U.S. embassies and consulates, the Foreign Service Lounge, and the Overseas Briefing Center. Information on state absentee voting procedures and state income tax liability. A Voting Assistance Guide is available online at <http://fvap.gov/vag/vag.html>.

For online information on voting residency guidelines for overseas citizens go to:

<http://fvap.gov/legal.html>.

American Association of Retired Persons (AARP)

601 E Street, NW

Washington, DC 20049

Tel: (202) 434-2277

<http://www.aarp.org>

AARP is a 35-million member service and lobbying organization with extensive resources for people over 50.

American Council of Life Insurance, Inc. (ACLI)

1001 Pennsylvania Avenue, NW

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Tel: (202) 624-2414

ACLI is an association made up of several previously independent insurance groups. It is concerned with legislative matters, intercompany communications, and the exchange of information. ACLI publishes the *Consumer's Guide to Life Insurance*.